



REPUBLIC OF ESTONIA  
MINISTRY OF JUSTICE

EJN/2017/9

# Meeting Report

## 49<sup>th</sup> Plenary Meeting of the European Judicial Network

22-24 November 2017  
Tallinn





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## Plenary session 23 November 2017

### Overview of the presentations

The 49<sup>th</sup> Plenary meeting of the European Judicial Network (EJN) took place from 23 to 24 November in Tallinn, Estonia under the Estonian Presidency of the Council of the European Union.

The meeting gathered around 120 participants: local authorities from the Republic of Estonia, EJN Contact Points from the EU Member States, candidate, associated and third countries, as well as representatives from Eurojust, the European Commission, the General Secretariat of the Council of the EU and EJN partners.

During the meeting participants focused on the practical application of the European Arrest Warrant (EAW) and the European Investigation Order (EIO), to follow up the discussions at the 48<sup>th</sup> Plenary meeting of the EJN in Malta in June 2017, as well as to discuss the influence of recent judgments of the Court of Justice of the European Union (CJEU) on the application of the EAW.

The first day of the meeting was chaired by Ms Astrid Laurendt-Hanioja from the Ministry of Justice of Estonia. The meeting was opened with remarks by Ms Lavly Perling, Prosecutor General of Estonia, Ms Kristel Niitam-Nyiri, Deputy Secretary General Ministry of Justice and Mr Ola Löfgren, Secretary to the EJN.

In the opening remarks, the EJN and its website was recognized as essential tools for judicial cooperation in criminal matters. It was mentioned that the efficiency of the fight against crime is achieved through judicial cooperation that is functioning and not hampered with delays and that the EJN Contact Points are crucial with the assistance they provide. The importance of the EJN Plenary meetings was underlined, as they provide an opportunity for the Contact Points to maintain and develop new contacts and also to discuss practical issues. It was also said that the work of the EJN strengthens ties not only across the EU but also within the Member States, *inter alia* through the establishment of national networks, inspired by the EJN model. Finally, participants from third countries were welcomed, e.g. representatives of the South Partner Countries (through the EuroMed Justice Programme).

Further, Mr Steven Cras, from the General Secretariat of the Council informed the participants about the Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (**ANNEX 1**).

The EJN Secretariat informed about the execution of the EJN Work Programme for 2017 and ongoing projects, e.g. the reorganisation of the Judicial Library and two new online tools: one for reporting the EJN statistics and activities (in place since the beginning of 2017), and the monitoring tool for the EJN website, intended to simplify the work of the EJN Tool Correspondents. Also the Report of activities and management of the EJN for 2015/2016 was presented (**ANNEX 2**).

With regard to the coming years, the EJN Secretariat presented the amended Work Programme for 2018 and 2019, which from now on will reflect all EJN activities and not only those activities that have a direct impact on the EJN budget, as it has been the case so far. Among the new projects, the follow-up of the Library project in the first half of 2018 was mentioned, together with all other EJN Priorities for the coming six months.





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## Introduction to the workshops: EAW and EIO

The main topics of the 49<sup>th</sup> Plenary meeting of the EJN were introduced by Ms Patricia Hamel, Legal officer from the EU Commission, DG Justice and Consumers who spoke about the EAW and Detention Conditions and by Ms Tuuli Eerolainen, State Prosecutor and EJN Contact Point from Finland who spoke about the Directive on the European Investigation Order.

Ms Hamel admitted that in some EU Member States, detention standards reportedly fall short of international laws and standards and this is an important topic for the Commission. One way of improving the detention conditions in the Member States is through financial support of the European Social Fund. The Commission is also considering whether a database on detention conditions would be useful for practitioners and this concept is being tested together with the European Union Agency for Fundamental Rights (FRA).

Ms Eerolainen presented the European Investigation Order, including the use of the EIO form (**ANNEX 3**). She mentioned which Member States have transposed the EIO Directive (2014/41/EU) so far, emphasizing the importance of the instrument. Ms Eerolainen also highlighted the language issue and invited Member States to re-consider the languages accepted as executing Member State, to avoid that the language issue becomes an obstacle for an efficient use of the instrument.

In the afternoon, the following three workshops took place:

- I. The EAW and prison conditions (CJEU Aranyosi and Caldaru cases) Chair: Mr Johannes Martetschläger (AT), Rapporteur: Ms Jolien Kuitert (NL).
- II. The EAW and time limits for surrender (CJEU Tomas Vilkas case). Chair: Ms Katre Poljakova (EE), Rapporteur: Ms Julia Derzilo (EE).
- III. Practical implementation of the EIO. Chair: Ms Tuuli Eerolainen (FI), Rapporteur: Ms Mare Tannberg (EE).

## Plenary session 24 November 2017

The second day of the meeting was chaired by Ms Imbi Markus from the Estonian Ministry of Justice. The workshop rapporteurs presented the outcome of the discussions to the Plenary and to the EJN Contact Points (**ANNEX 4, 5 and 6**). See the full Workshop Conclusions below.

The EJN Contact Points were also provided with an opportunity to report about the EJN Regional and National meetings that had been organised in the second half of 2017 with financial assistance received through the EJN budget.

In the course of the second day presentations were made on different topics. Mr Peter Csonka, Head of Unit European Commission presented the recent developments regarding the European Public Prosecutor's Office (EPPO) (**ANNEX 7**). The participants also heard presentations about the EuroMed Justice project (**ANNEX 8**), the use of a digital signature in criminal proceedings in Estonia (**ANNEX 9**) and possible ways forward for judicial cooperation in view of the UK Brexit (**ANNEX 10**).

The Plenary was concluded with an intervention by Mr Tsvetomir Yosifov, representative of the upcoming Bulgarian Presidency inviting all participants to Sofia for the 50th Plenary Meeting of the EJN and the 20<sup>th</sup> Anniversary of the foundation of the EJN (**ANNEX 11**).



## Workshop Conclusions

### Workshop I - EAW and detention conditions: consequences of the CJEU Decision on Pál Aranyosi (C-404/15) and Robert Căldăraru (C-659/15 PPU) cases

#### Background

Following the examination of the preliminary questions posed by the *Aranyosi and Căldăraru* cases, the CJEU held that the execution of EAWs must be deferred or eventually ended if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued.

This judgment has a significant impact on the surrendering of persons under the European Arrest Warrant procedures. As a consequence, the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. The CJEU added that if the existence of a risk of inhuman or degrading treatment cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be ended.

Practitioners from EU and third countries discussed the different questions and shared their experiences and the measures taken in several cases affected by the *Aranyosi/ Căldăraru* Judgment. Many practical points were considered since the decision of the CJEU had opened many gaps in the EAW procedure.

#### Conclusions

##### **General Conclusions on the consequences for the EAW procedure**

The practical significance of the *Aranyosi and Căldăraru* decision has opened several discussions among practitioners. The EJN Contact Points remarked that a gap has been created between respecting the CJEU and ECHR and the principle of Mutual Recognition and Mutual Trust. In several cases the EAW procedures are being ended without a final surrender (impunity!). Furthermore, in some cases National Courts are asking for detention conditions that not even their own state is able to provide.

Surrender within the EU has almost become more challenging than extradition between the EU and third countries. Paradoxically, third countries extradite to EU Member States where the detention conditions are questioned within the EU. And in cases of extradition to a third country, Member States seem to be less rigid than within the EU regarding the detention conditions in third countries.



## 1. Executing Member States

- a. **Assessing systemic and generic risks:** Judicial authorities base their decision to request additional information on detention conditions on the ECHR and national case law, CPT reports, NGO reports, proof/ complaints presented by the defence attorneys and even on complaints received by previously transferred persons. On the other hand, internet and newspapers are not considered reliable sources. Although under the principle of Mutual Recognition the EJC Contact Points underlined that the obligation to request additional information does not become a permanent part of the process, a comprehensive database describing the current information per country and judgments would be useful to gather the sources available in one place. However, this database should remain updated, specific and not undermine mutual trust.
- b. **Template for additional information on detention conditions:** The type of information required from the Issuing Member State is decided on a case by case basis. It was concluded that to provide executing Member States with a template describing multiple options or a model questionnaire would not be advisable. These kinds of documents could invite the judiciary to enquire more information than necessary from the issuing authorities. Member States should be proportionate in their requests and not be tempted to request more information than what is strictly necessary to ensure that the person to be surrendered would not be at risk of inhuman or degrading treatment.

## 2. Issuing Member States

- a. **Information on detention conditions:** Upon the receipt of a request for additional information under article 15.2 of the EAW FD, the EJC Contact Points confirmed that a practice has been established to provide standardised information regarding the detention conditions of their country. This allows the executing authority to fulfil the timelines and manage the requests. However, it was discussed among the experts that it would be preferable to receive tailored replies since providing information that is not required could lead to raising additional questions in the executing Member State.

## 3. Alternatives to the execution of the EAW

- a. **Selected detention facilities:** It was discussed if identifying and only providing the option to surrender the persons to several "luxury" detention facilities could help to solve the problem. This would be in line with the detention conditions required for the surrender and could be an intermediate alternative solution, until improvements can be done in all detention centres. Participants indicated though that placing detainees in selected facilities creates a new set of problems, e.g. in generating inequality and rewarding persons who have fled abroad with a better treatment.
- b. **Transfer of proceedings:** EJC Contact Points indicated that it is difficult to apply transfer of proceedings, even if by national legislation they would be legally bound to investigate and



prosecute the person, since often jurisdiction is missing or on occasions obtaining the necessary evidence is problematic followed by discontinuation and acquittal

- c. **Transfer of sentenced persons:** Practitioners explained that in practice the Member State involved do not send a request for transferring the sentenced person. One of the reasons is the proximity to the place of residence and family, which could affect the reintegration to the society.

#### 4. Impunity because of the Judgments

The judgment states that if the existence of the risk of inhuman or degrading treatment cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be ended. The participants agreed that in practice this has resulted in impunity. In several cases, National Courts are refusing the requests for surrender and releasing the persons involved. Consequently, suspects are not being brought to justice or convicted persons do not serve their sentence, putting public security at risk.

Another consequence relates to the victims of crime. In case of impunity, victims are prevented from obtaining justice and compensation for the crimes committed against them.

#### 5. The role of the EJM

- a. **Facilitating exchange of information:** The EJM has been identified as a key element for facilitating the communication between the competent authorities. According to the EJM Contact Points they have assisted in several cases and they did not encounter difficulties establishing a dialogue with the other Member States and obtaining the requested information.

The development of a new network dedicated to the exchange of information on detention conditions for the EAW procedure did not find support. Instead it was recommended that EJM Contact Points - that are specialists in detention conditions- are indicated in the EJM website as such, for practitioners to identify the most suitable contact.

- b. **Information on the EJM Website:** Participants emphasised that it would be useful to gather national case law on this topic and to present it on the EJM website. In this way, and by providing a summary in English, practitioners would be able to get a better picture on the development in the other Member States. In case of need further information could be requested from the EJM Contact Points.

#### 6. The role of Eurojust

- a. **Report on Article 17 (7) of the EAW FD:** In case there is a delay on the execution of an EAW, Member States are obliged to inform Eurojust about it and the reasons for the delay. Eurojust will distribute a new template soon with the aim of streamlining the information that the Member States should send to Eurojust. The EJM Contact Points would welcome information on the amount of cases of delays reported by the Member States to Eurojust to further understand the



- extent of the problem with detention conditions and thereby the effectiveness of the EAW.
- b. **Coordination Meetings:** Eurojust offers the opportunity to discuss and assist in issues related to detention conditions such as the need for additional info and reaching solutions for authorities through coordination meetings.

## 7. Suggestions for the European Commission and final remarks

The EJM Contact Points welcomed an evaluation by the European Commission of the implementation of the EAW FD in due time. They also suggested that it would be advisable to facilitate awareness raising among the CJEU and ECtHR as well as the national courts about the different issues affecting international judicial cooperation in criminal matters and the practical consequences of the judgments.

There was a general agreement that the efficiency of the EAW and as a consequence public security in the Member States will continue to be at risk unless the detention conditions are brought to an appropriate level in all Member States. In this regard the funding possibilities offered by the European Commission to accelerate the restorative process of prisons and detention centres should be further explored to solve a swift growing problem of impunity that effects the security of the EU citizens.

### Workshop II - EAW and time limits for surrender: executing an EAW in line with Articles 15(1) and 23 of the EAW Framework Decision in light of the CJEU Decision on Vilkas (C-640/15)

#### Background

On 25 January 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-640/16 Vilkas. The Court interpreted Articles 15(1) and 23 of the EAW Framework Decision (EAW FD) and concluded that the authorities responsible for executing a EAW must, in the event of *force majeure* being established, set a third surrender date where the first two surrender attempts have failed on account of the resistance put up by the requested person. In its judgment, the CJEU clarifies the meaning of the concept "*force majeure*" ("circumstances beyond the control of the Member States concerned") in the context of the EAW FD, but underlines that it is for the national court to make the final assessment as to whether the circumstances in the case at hand constitute "*force majeure*" or not.

The CJEU concluded that authorities remain obliged to agree on a new surrender date if the time limits mentioned in Article 23 have expired.

At the 49<sup>th</sup> Plenary meeting of the European Judicial Network, the EJM Contact Points discussed these matters and shared their experiences and the measures taken in a number of cases affected by the Vilkas Judgment. Several related practical points were considered.



## **Conclusions**

### **1. Time limits and procedures for surrender of the person (Article 23 EAW FD)**

According to the CJEU, Articles 15(1) and 23 must be interpreted as meaning that issuing and executing authorities remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired, whereas the number of new surrender dates are not expressly limited where surrender has failed more than 10 days. Also, Article 15(1) of the EAW FD cannot be interpreted as meaning that, once the time-limits stipulated in Article 17 of the EAW FD have expired, the executing judicial authority is no longer able to adopt the decision on the execution of the EAW or that the executing Member State is no longer required to carry out the execution procedure in that regard.

The EJN Contact Points discussed national regulation in the Member States with regard to mandatory time limits for surrender of the person (Article 23 EAW FD). It turned out from the discussion that there are Member States where according to national law person will be surrendered within 10 days after final decision on the execution of the EAW and there is possibility to extend time limit to surrender (e.g. due to force majeure). On the other hand, in some Member States where there are strict time limits in the national law for the total duration of detention in relation to execution of the EAW (for taking a surrender decision and for actual surrender of the person), the extension of the time limit to surrender a person after the deadline to release the person from detention has reached, might not be possible.

To acknowledge these differences, a compilation of national legislation transposing Articles 17 and 23 of the EAW FD was seen by the EJN Contact Points as a potentially useful source of information. The compilation could include both the time limits for the decision on surrender as well as time limits for the actual surrender of the person (*fiches estoniennes*, which could also be integrated in the existing tools).

### **2. Detention and release of the requested person**

CJEU is referring that the person can be kept in detention during pending execution of an EAW only if the duration of the detention is not excessive in light of Article 6 Charter (and not merely upon expiry of the time limits as stated in Article 23 (5)).

With regard to the duration of detention concerning execution of the EAW, there are Member States who have strict time limits for the total duration of detention and others with no maximum time limits for detention. Thus, time limits for the detention vary across Member States. In Member States where strict time limits for detention apply, the person has to be released after the deadline provided for in the national law is reached. Such deadlines may vary between 60 days and 9 months as revealed in the discussions between the EJN Contact Points.

In Member States where there is no maximum time limit for detention prescribed in national law, the person can be held in custody for an unlimited period until the surrender has taken place



### 3. Postponement of the surrender due to “circumstances beyond the control of any of the Member States” (*force majeure*) (Art 23(3) EAW FD)

The CJEU states that there is a divergence between the various language versions of Article 23(3), which provides for that a new surrender date may be agreed upon between the issuing and executing Member State when “circumstances beyond the control of any of the Member States” i.e. *force majeure* occurs in view of the surrender.

The EJM Contact Points discussed references to *force majeure*/ any other circumstances in the national legislation of their Member States as ground for not carrying out the actual surrender within the time limit. Most Member States have implemented Art 23(3) into national law as circumstances beyond the control of any of the Member States“. Thus, these circumstances are in practice a matter of case by case interpretation, which can occasionally be broader than the term *force majeure* would imply. However, there was a common agreement among the EJM Contact Points that the interpretation should be strict.

Several examples of possible “circumstances beyond the control of any of the Member States” were discussed. Contact Points had different opinions if sickness of the person concerned can be viewed as such, or self-destructive behaviour of the person concerned or issues with the flight (delay or cancellation). Eruption of a volcano, on the other hand, was commonly agreed to be a textbook example of *force majeure*.

The opportunity to collect important examples of national case law regarding the notion „*force majeure*“ was raised in the discussions as one way of reaching a common understanding. It was however agreed that for several reasons (such as the issue of translation of national case law) the need to implement this suggestion should be first analysed further.

### 4. Best Practices

The EJM Contact Points reflected on possible best practices between issuing and executing Member States with regard to surrendering the person concerned, which aim at an efficient cooperation between Member States.

Several Member States highlighted already existing good cooperation with neighbouring Member State(s) with regard to the actual surrender.

It was mentioned as a problem by some of the Member States that while executing an EAW the authorities encountered a situation where the issuing Member State was not able or willing to collect the requested person on time, which had already been agreed. This situation could result in the requested person being released from detention, either because *force majeure* could not be established or the executing Member States might apply strict deadlines on the length of detention.

Key to solve these situations would be efficient communication between the authorities of the executing and issuing Member States. Thus, if the issuing Member State has problems with collecting the person concerned, it should inform the executing Member State as soon as possible. In such a situation, the EJM Contact Points have an important role to play in facilitating the communication.

Exceptionally, the executing Member State might provide assistance with the actual surrender, in



particularly pressing situations, e.g. where the release of the person would be unacceptable for the society and justice.

## 5. Role for the EJM Contact Points and the EJM Website

The major role for the EJM Contact Points in relation to the situations in the Vilkas judgment, was agreed to be consultation and communication between the issuing and executing Member State. The EJM is available to assist in case of delay from the side of the issuing Member State or with any other issue that may cause unnecessary delays of the surrender.

The EJM Contact Points confirmed that there is a constant need for raising awareness of the EJM; in many Member States practitioners still lack sufficient knowledge about the EJM. This issue should be tackled – mainly internally – in order to assure that practitioners across EU are aware of the possibilities and the channels offered to them by the EJM.

## 6. EJM Website

The EJM Contact Points underlined that if a compilation of national legislation implementing Articles 17 and 23 of the EAW FD was undertaken, such a compilation should be uploaded and information made available on the EJM website.

And should national case law regarding the notion of „*force majeure*“ be collected, this information should also be made available on the EJM website.

## Workshop III - Practical implementation of the European Investigation Order in criminal matters

### Background

The Directive 2014/41/EU of 3 April 2014 on the European Investigation Order in criminal matters (“EIO Directive”) was a priority for the European Judicial Network (EJM) since it was adopted and several measures have been taken by the EJM Secretariat and the EJM Contact Points - before and after 22 May 2017 - in order to facilitate its transposition into national legislations and a smooth practical implementation, especially during the transition period.

At the 49th plenary meeting of the European Judicial Network, the participants in Workshop III – “Practical implementation of the European Investigation Order in criminal matters” discussed aspects regarding the practical application of the EIO Directive and shared experiences on challenges faced and solutions identified to mitigate them.



The general aim of the discussions was to know which were the main challenges the national authorities encountered as of 22 May 2017 in gathering evidence in criminal matters:

- mainly between Member States which both have transposed the EIO Directive;
- but also in relation between a Member State which transposed the directive and a Member State which did not transpose it yet.

## **Conclusions**

### **1. Scope of the EIO Directive**

Due to the diverse interpretation of what is meant by “corresponding provisions” of the conventions mentioned in Article 34 (1) of the EIO Directive to be replaced by this new legal instrument, the scope of the EIO Directive is still under debate. The EJN compiled the views of the EJN on this issue in the document ‘*EIO – Legal and practical implications*’. Moreover, the EJN worked together with Eurojust for the preparation of the ‘*Note on the meaning of “corresponding provisions” and the applicable legal regime in case of delayed transposition of the EIO Directive*’<sup>1</sup>.

While discussing the scope of the EIO Directive, the EJN Contact Points had different views on whether issuing an EIO for hearing of the accused person by videoconference during a trial and allowing the accused person to be present through the trial by videoconference is possible. Some Member States stated that according to their national law, they can only accept using videoconference for gathering evidence.

However, several other issues were mentioned by the participants as not falling under the scope of the instrument. Firstly, the participants agreed that if the request is not about gathering evidence it is not covered by the EIO. Secondly, it was commonly agreed that service of documents falls, in principle, out of the scope of the EIO, except when it is part of the investigation measure requested in an EIO. However, no particular problems had occurred in practice in this respect. Finally, it was also argued that the provisions regarding police cooperation measures are replaced by the EIO when these are used for judicial cooperation.

With regard to the relation between the EIO and the EAW, the EJN Contact Points concluded that what was possible under the MLA framework should be possible under the EIO. Recitals 25 and 26 of the EIO Directive could be of help in this regard.

### **2. Applicability of the ‘rule of speciality’**

Apart from its specific role in extradition and transfer of sentenced persons matters, the ‘rule of speciality’ traditionally applies also to rogatory letters for gathering evidence; see for instance Art. 23 of Convention 2000 on Mutual Assistance in Criminal Matters (2000 Convention). The EIO Directive however does not expressly regulate this rule.

The EJN Contact Points discussed whether the evidence obtained following an EIO is subject to the rule of speciality or not and if yes, would it only apply to situations where double criminality needs to be met. Article 19 of the Directive that gives provisions on confidentiality was brought forward as an argument for the rule of speciality to be applied. It was also argued that EIO is issued with respect to specific

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<sup>1</sup> Both documents available in Council Doc 9936/17 LIMITE

proceedings and using obtained evidence in other proceedings should not be automatically possible as other grounds for refusal might occur in the latter. In conclusion, the participants had different opinions whether the rule of specialty is applicable to the EIO, since it is not expressly mentioned in the Directive.

It was also mentioned that in order to ensure that no problems occur, a request should be made, preferably by using EIO form before using the evidence for other purposes than what was stated in the original EIO.

### **3. EIO in urgent matters**

The EIO Directive does not regulate the need for provisional measures to be taken before an EIO is issued.

With regard to sending an e-mail or other informal request before sending the EIO, the Contact Points explained in the Workshop that in some Member States e-mail or even phone requests are accepted in urgent cases before receiving the actual EIO. In this case, the EIO is expected shortly after. Article 7 'Spontaneous exchange of information' of 2000 Convention could be a solution in some situations. Contact Points pointed out that more coercive measures could be considered troublesome to handle before the EIO is received.

In urgent situations, some Member States might be willing to act on the basis of an EIO before it has been translated into one of the languages accepted.

With regard to the validation, in some urgent situations, especially during public holidays or weekends, it might not be possible to obtain the handwritten signature of the validating authority. The question discussed by the EJM Contact Points was whether this problem can be mitigated by an e-mail confirmation from the competent validating authority or at least with an electronic signature, which could be accepted by some member states. It was suggested by the participants that the EJM Contact Points could intervene in circumstances like these by assisting in situations when the validating authority is not available to sign the EIO, e.g. vouching for the identity and decision by their national colleague.

### **4. Competent issuing authorities**

With regard to verification whether the issuing or validating authority of an EIO is competent, it became clear during the discussions that normally national authorities rely upon mutual trust, however verifications are done on random basis.

With regard to assessing whether the EIO received has been issued or validated by a competent authority, the EJM Contact Points confirmed that the document 'Competent authorities and accepted languages' prepared by the EJM Secretariat and published on the EIO area of the EJM website was useful.

### **5. Identifying the competent executing /receiving authorities**

According to the EJM Contact Points, there are no particular difficulties for the issuing authorities to find the competent executing/receiving authority of an EIO. The information available in the EJM Atlas was considered very useful and the timely adaptation of the Atlas to the EIO Directive of great importance as



soon as the EIO Directive is transposed in the respective Member State.

For the purposes of the Atlas, the EIO Directive coexists with other legal instruments as potential legal basis, depending on the status of implementation of the EIO Directive and in relation to Denmark and Ireland.

The importance of keeping the Atlas up-to-date and the crucial role of the EJN Tool Correspondents in this regard was underlined.

## 6. Time limits

Like other mutual recognition instruments, the EIO Directive provides time limits for recognition or execution. This is one of the most important added values to the 'traditional' MLA system. From a practical point of view, the EJN Contact Points did not highlight any particular problems regarding compliance with the time limits for the recognition or execution of the EIO.

## 7. Proportionality/Necessity

The EJN Contact Points were invited to assess how the proportionality and necessity aspect had been handled in practice so far and what would have been the consequences if the executing authority found that the requirement of proportionality and necessity are not respected by the issuing authority (bearing in mind that this is not a ground for refusal according to the EIO Directive).

It was commonly agreed that if this requirement was not respected, it technically could not be viewed as a ground for refusal. In case of doubt, the executing authority should ask for an explanation and additional information from the issuing authority. It was nevertheless acknowledged that execution could be refused in exceptional cases.

One reason mentioned for why the executing authority might raise the question of proportionality and necessity is that the description of the offence sometimes is not detailed enough or the requested investigative measure is too wide and difficult to justify or not concretely described to make a proper assessment. Member States stressed that the requested measure has to be relevant and no "phishing expeditions" are allowed.

Additional problems in assessing the proportionality and necessity might be generated by different words used for "necessary" in other language versions of the EIO Directive. The EJN Contact Points admitted that sometimes problems indeed had been raised by the translation of the words "proportionality" and "necessity" in some languages. It was agreed that when in doubt, practitioners should check the English version of the EIO Directive.

## 8. Previous MLA requests

The EJN Contact Points discussed possible interpretation of Article 35 (1) of the EIO Directive, namely in a situation where both cooperating Member States have transposed the Directive, but they have an ongoing case that started before both or one of them transposed the EIO Directive and therefore have been handling MLA requests between each other. The question raised was whether a Member State



may send an additional MLA request as a continuation to a previous MLA request after both cooperating States have transposed the EIO Directive.

The EIJN Contact Points shared the view that a supplemental EIO should be issued instead of continuing with MLA.

## 9. Other problems in the practical application of the EIO

In addition to the above-mentioned aspects of practical application of the EIO, the Contact Points were invited to highlight any other problem encountered. Issues that were mentioned were the following:

- New competent executing authorities compared to the MLA framework, in some cases.
- Situations when a national decision in the Issuing Member State is required by the Executing Member State, although the EIO normally should be regarded as the “national decision” (e.g. in cases of a request for interception of telecommunications).

The EIJN Contact Points also shared views on how to deal with these issues. One of the solutions highlighted was a document on Frequently Asked Questions (FAQ) to answer to particular questions of national authorities in a Member State regarding the practical application of the EIO Directive.

## 10. EIO on the EIJN website

The information on the EIJN website on the EIO was considered very useful, provided that it is updated on regular basis. The important role of the EIJN Tool Correspondents with regard to updating the website was underlined. One of the suggestions made by the participants was the creation of a FAQ (see above) as an additional feature for the EIO section. Alternatively, information suitable for an FAQ, could be provided in the Fiches Belges.

## 11. Transitional period

The question raised was how the requested/executing authorities from a Member State, which has not transposed the EIO Directive, treat an EIO sent from a Member State which has transposed the Directive.

Most Member States, which did not transpose yet the EIO Directive treat EIOs as MLA requests.

It was also noted that in some cases, judicial authorities from Member States which have transposed the EIO Directive, still issue MLA requests. Such practice should be avoided and executing authorities are encouraged not to execute such MLA requests as this could at a later stage create problems with admissibility of evidence in the issuing Member State.

EIJN Contact Points underlined the importance of relevant training and of updated information about the EIODirective.

